Bongsor Bina Sdn Bhd v Manzer Medical Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3-22-53 OF 2003, S6-22-588 OF 1999, S5-22-193 OF 2000
MOHD HISHAMUDIN J
4 OCTOBER 2004

Civil procedure — Solicitors — Appointment — Whether a party can appoint two solicitors in two different suits that have been consolidated — Whether service of process must be done to both solicitors — Whether unfair as plaintiff's witness can be cross examined twice

This was an interlocutory application by the plaintiff for an order that the first defendant in suit S3-22-53-2003 ('the first suit') and the sole defendant in suit S5-22-193-2000 ('the third suit), appoint only one solicitor on record for the purpose of the proceeding in the present consolidated action on the grounds that appointment of two solicitors means service of process must be done twice and it is unfair as the plaintiff's witnesses can be cross examined twice.

Held, dismissing the plaintiff's application with costs:

(1) There is a principle that a party to a proceeding has a fundamental right to freely appoint a solicitor or counsel of its choice. The plaintiff's solicitor will have to serve the process on both solicitors (see paras 19 and 22).

(2) The question of unfairness does not arise because at the trial counsel from Messrs Apandi Ali will have to confine his cross-examination of the witness only to matters relevant to the first suit, whereas counsel from Messrs Thangaraj will have to confine his cross-examination only to matters relevant to the third suit (see para 23).

[**Bahasa Malaysia summary**

Ini adalah permohonan interlokutori plaintif untuk satu perintah defendan pertama dalam guaman S3-22-53-2003 (guaman pertama) dan defendan tunggal dalam guaman S5-22-193-2000 (guaman ketiga) melantik hanya satu peguamcara dalam rekod bagi prosiding tindakan ini yang telah disatukan atas alasan bahawa pelantikan dua peguamcara bermakna penyampaian proses haru dilakukan dua kali dan ia adalah tidak adil kerana saksi plaintif boleh disoal balas dua kali.

Diputuskan, menolak permohonan plaintif:

(1) Terdapat satu prinsip bahawa sesuatu pihak kepada prosiding mempunyai hak asasi untuk secara bebas melantik satu peguamcara atau kounsel kehendaknya. Peguamcara plaintif harus menyampaikan proses kepada kedua-dua peguamcara (lihat perenggan 19 dan 22).

(2) Soalan mengenai ketidakadilan tidak timbul kerana dalam perbicaraan kelak peguam dari Tetuan Apandi Ali harus pastikan soal balasnya

hanya merangkumi kepada perkara yang relevan kepada guaman pertama, manakala peguam dari Tetuan Thangaraj harus pastikan soal balasnya hanya merangkumi perkara yang relevan kepada guaman ketiga (lihat perenggan 23).]

Notes

For cases on solicitors, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5384–5403

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 (refd)

Oswald Hickson Collier & Co v Carter-Ruck [1984] 1 AC 720 (refd)

Timothy D McFetridge, Executor of the Estate of Kent George McBain Ward, deceased and Ors v Olds Aviation Ltd [1997] 69 A.C.W.S. (3d) 427 (refd)

Legislation referred to

Legal Profession Act 1976

Rules of the High Court 1980 O 5 r 6, O 4 r 1(2), O 6 r 4(1)(a), (2)(a), O 12 r 1, 2(2), 2(3)(b), 4(2)

KL Pang (Cheah Teh & Su) for the plaintiff in Civil Suits No S3-22-53 of 2003, S6-22-588 of 1999 and S5-22-193 of 2000

Mohd Ilias (Apandi Ali & Co) for the first, second and third defendants in Civil Suit No S3-22-53 of 2003

YC Lee (Thangaraj & Associates) for the fourth defendant in Civil Suits No S3-22-53 of 2003 & S6-22-5 88 of 1999

Karen Lee (Lee Min Choon & Co) for the defendant in Civil Suit No S6-22-588 of 1999

Mohd Hishamudin J:

[1] The summons in chambers at encl 87 is the plaintiff's (Bongsor Bina Sdn Bhd) interlocutory application for an order that Manzer Medical Sdn Bhd ('Manzer'), that is, the first defendant in suit S3-22-53-2003 ('the first suit') and the (sole) defendant in suit S5-22-193-2000 ('the third suit), appoints only one solicitor on record for the purpose of the proceeding in the present consolidated action.

[2] There is also an alternative prayer by the plaintiff that the issues in the third suit be tried separately from and after the conclusion of the consolidated action, citing O 15 r 5(1) of the Rules of the High Court 1980 ('the RHC').

[3] Manzer presently has two solicitors on record, namely:

(a) Messrs Apandi Ali & Co, the solicitor on record for Manzer in the first suit; and

(b) Messrs Thangaraj & Associates, the solicitor on record for Manzer in the third suit.

[4] Manzer opposes this application.

[5] The three cases in the present proceeding, namely:

(a) the first suit;

(b) the second suit, namely, civil suit No S5-22-193-2000; and

(c) the third suit,

were consolidated on 19 June 2003 on the application of the plaintiff pursuant to an order of court. It was a consent order.

[6] The plaintiff's cause of action against Manzer in the first suit is different from the plaintiff's cause of action against the same in the third suit. In the first suit, the plaintiff's causes of action against Manzer are for alleged breach of contract and conspiracy to defraud the plaintiff.

[7] In the third suit, the plaintiff's cause of action against Manzer is for alleged unlawful retention of a performance bond/guarantee executed by the plaintiff in favour of Manzer.

[8] As can be seen from the title of the present action, Manzer is not a party in the second suit.

[9] It is pertinent to note that the plaintiff, when applying for the three cases to be consolidated vide its summons in chambers dated 7 May 2003, was fully aware that Manzer was represented by different solicitors in the first suit and in the third suit; and did not at any time during the hearing of the application raise any objection to Manzer to continue having different solicitors for the two suits *in the event* the plaintiff's application for consolidation were to be allowed. It was only subsequently, after the plaintiff had succeeded in obtaining the order for consolidation, that the issue of representation was raised.

[10] Before the consolidation, Manzer was represented by Messrs Apandi Ali in the first suit, and by Messrs Thangaraj in the third suit.

[11] After the consolidation, however, Manzer continues to be represented by Messrs Apandi Ali in the first suit; and continues to be represented by Messrs Thangaraj in the third suit.

[12] I have dismissed the plaintiff's application with costs.

[13] In *Halsbury's Laws of England* (4th Edn) vol 37, a consolidation of cases is defined as follows (at p 60):

> **69. Consolidation.** Consolidation is a process by which two or more causes or matters are by order of the court combined or united and treated as one cause or matter. The main purpose of consolidation is therefore to save costs, time and effort, and to make the conduct of several actions more convenient by treating them as one action.

[14] Encik KL Pang, the learned counsel for the plaintiff, contends that such a situation as the present (where, on record, Manzer employs two firms of solicitors, one for each of the two suits) is legally improper. The learned counsel contends that after the consolidation order the three suits have now become one cause or matter or action, and hence Manzer can no longer employ different solicitors for the first and third suits: it must employ only one solicitor on record.

[15] But Encik Pang, however, is unable to point to any provision in the Legal Profession Act 1976 or in the RHC which *specifically* disallows Manzer from employing two different solicitors. He, however, refers to the following provisions of the RHC:

(a) O 5 r 6;

(b) O 6 rr 4(1)(a) and (2)(a); and

(c) O 12 rr 1, 2(2), 2(3)(b), and 4(2).

[16] With respect, I find these provisions irrelevant. These provisions cited by counsel only deal with the appointment of a solicitor by a party in a normal situation, that is to say, in a *single* suit situation. The provisions, however, do not deal with the peculiar situation that is now before this Court. The provisions do not deal with the appointment of solicitors in respect of a consolidated action. In the present case, we are concerned with the appointment of a solicitor by a party in *two different* suits that have been consolidation, namely, the first suit and the third suit.

[17] In my judgment, the existence of the three suits that have been consolidated cannot be ignored even after the consolidation order. It is true that after the consolidation order, the three suits are to be treated as one cause or matter or action. However, be that as it may, the *existence* of the individual suits that are consolidated do not come to an end or are not obliterated by reason of the consolidation. In a consolidation of cases, the individual suits still exist and this fact is reflected in the title of the consolidated action. O 4 r 1(2) stipulates:

> (2) An order for consolidation must be in Form 1 and shall direct that the cause or matter in which the application is made shall thence forward be carried on in such other cause or matter *and that the title of such other cause or matter be amended by adding thereto the title of the cause or matter in which the application is made*. [emphasis is mine]

[18] In other words, the consolidation order does not affect the identity or the existence of the cases that have been consolidated, or the status of the parties to the suits. Nor does it affects the pleadings.

[19] Another reason why I dismissed the present application is that there is the principle that a party to a proceeding has a fundamental right to freely appoint a solicitor or counsel of its choice. This principle is practised in other jurisdictions as well. For example, in the Canadian case of *Timothy D McFetridge, Executor of the Estate of Kent George McBain Ward, deceased & Ors v Olds Aviation Ltd* [1997] 69 A.C.W.S. (3d) 427, the Court ruled:

The right of the subject freely to choose and instruct solicitors and counsel is fundamental.

[20] In the English Court of Appeal case of *Oswald Hickson Collier & Co. v Carter-Ruck* [1984] 1 AC 720, Lord Denning MR (at p 723) said:

> It was submitted by Mr Cullen that – as the relationship between a solicitor and his client is a fiduciary relationship – it would be contrary to public policy that he should be precluded from acting for a client when that client wanted him to act for him: especially in pending litigation. It seems to me that that submission is right.
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> ... It is contrary to public policy because there is a fiduciary relationship between them. The client ought reasonably to be entitled to the services of such solicitor as he wishes. That solicitor no doubt had a great deal of confidential information available to him. It would be contrary to public policy if the solicitor were prevented from acting for him by a clause of this kind.

[21] The above principle must be respected and applied to the facts of the present case. Of course, needless to say that the application of this principle is subject to any written law such as the Legal Profession Act 1976 or the RHC, and a court of law must depart from this cardinal principle, if the peculiar circumstances of the case so require with a view to doing justice between the parties. In the present case, however, the learned counsel for the plaintiff has failed to convince me that the present case is so exceptional that a departure from the principle is warranted.

[22] Encik Pang further submits that if Manzer is allowed to employ both Messrs Apandi Ali and Messrs Thangaraj there will be duplicity in the service of documents or processes. He argues that the plaintiff will have to serve a process twice on Manzer's solicitor: first on Messrs Apandi Ali, and second on Messrs Thangaraj. I accept that the plaintiff's solicitor will have to serve the process twice on Manzer, that is to say, on Messrs Apandi Ali and on Messrs Thangaraj. But, with respect, I think it is wrong to regard such services as *duplicity* because, as has been explained just now, although there has been a consolidation, the existence of the first suit and the third suit are not extinguished; and that being the case, the service of the process on Messrs Apandi Ali is not the same as the service of the process on Messrs Thangaraj. The service on Messrs Apandi Ali is in respect of Manzer as the litigant (the first defendant) in the first suit, whereas the service on Messrs Thangaraj is in respect of Manzer as the litigant (the sole defendant) in the third suit.

[23] Encik Pang also submits that if there are going to be two solicitors representing Manzer there will be unfairness to the plaintiff at the trial in that Manzer's counsel will be able to cross-examine each of the plaintiff's witnesses twice: the first cross-examination will be by Manzer's counsel from Messrs Apandi Ali, and the second cross-examination will be by Manzer's counsel from Messrs Thangaraj. With respect, the question of unfairness does not arise because at the trial the counsel from Messrs Apandi Ali will have to confine his cross-examination of the witness only to matters relevant to the first suit, whereas the counsel from Messrs Thangaraj will have to confine his cross-examination only to matters relevant to the third suit.

[24] In any case, the plaintiff is now estopped from raising this issue of unfairness. As has been pointed out in the earlier part of this judgment, the plaintiff, when applying for the three cases to be consolidated, although fully aware that Manzer was represented by different solicitors in the first suit and in the third suit, yet had not thought it fit then to raise any objection to Manzer to continue having different solicitors for the two suits *in the event* the plaintiff's application for consolidation were to be allowed. Only later in October 2003, some four months after the plaintiff had obtained the order for consolidation (and it is pertinent to point out again that it was a consent order), that the plaintiff thought it fit to raise the present issue of representation. In my judgment, it is too late now and would not be fair to Manzer for this Court to allow the plaintiff to raise the issue of representation at this stage. The plaintiff should have raised this issue of representation at the time of making the application for consolidation. Having not objected then (despite being aware of the facts) but instead entering into a consent order with Manzer, there was an *implied* representation by the plaintiff then that the arrangement regarding the solicitors on record for Manzer was acceptable to the plaintiff.

[25] In *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283, the Federal Court explained the scope of doctrine of estoppel in the following manner:

> The time has *come* for this Court to recognize that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.

[26] Application dismissed with costs.

Plaintiff's application dismissed with costs.

Reported by AG Kalidas